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KEN BENNETT
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State of Arizona
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Forty-ninth Legislature
Second Regular Session
2010

CHAPTER 108

SENATE BILL 1202

AN ACT

AMENDING SECTION 33-812, ARIZONA REVISED STATUTES; RELATING TO DEEDS OF TRUST.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 33-812, Arizona Revised Statutes, is amended to
3 read:

4 33-812. Disposition of proceeds of sale

5 A. The trustee shall apply the proceeds of the trustee's sale in the
6 following order of priority:

7 1. To the costs and expenses of exercising the power of sale and the
8 sale, including the payment of the trustee's fees and reasonable attorney
9 fees actually incurred.

10 2. To the payment of the contract or contracts secured by the trust
11 deed.

12 3. To the payment of all other obligations provided in or secured by
13 the trust deed and actually paid by the beneficiary before the trustee's
14 sale.

15 4. To any condominium association or planned community association as
16 defined in chapter 9 or 16 of this title that had a subordinate lien as
17 provided by law, even if the trustee intends to deposit the balance pursuant
18 to subsection C of this section. The trustee may pay an association's lien
19 on receipt of a written claim and shall be discharged from any liability for
20 any payment made in good faith. The trustee may inquire as to the existence
21 of a lien if there is a recorded declaration on the property without regard
22 to whether a lien has been recorded. Any person who is an applicant or
23 respondent pursuant to subsection H of this section may require the
24 condominium association or planned community association to prove its
25 entitlement to any funds received from the trustee. An association that
26 demonstrates that the amount it received from the trustee was proper in all
27 material respects is entitled to an award of its reasonable attorney fees and
28 court costs against the applicant or respondent who contested the payment.
29 If the applicant or respondent against whom the association's award is
30 entered is entitled to excess proceeds of the sale, the award of attorney
31 fees and costs shall be payable from those excess proceeds.

32 5. To the junior lienholders or encumbrancers in order of their
33 priority as they existed at the time of the sale. After payment in full of
34 all sums due to all junior lienholders and encumbrancers as of the date of
35 the sale and excluding any postsale attorney fees, payment shall be made to
36 the trustor, except that if the trustor has sold or transferred the property
37 to another owner before the trustee's sale, payment shall be made to the
38 person who is the owner of record at the time of the trustee's sale.

39 B. After application of the proceeds pursuant to subsection A,
40 paragraphs 1, 2 and 3 of this section, if there are additional proceeds to be
41 distributed, the trustee, within fifteen days of the completion of the
42 trustee's sale, shall mail by first class mail and by certified or registered
43 mail, postage prepaid, TO ALL KNOWN ADDRESSES a notice of any excess proceeds
44 to the trustor as of the date of the recording of the notice of sale. The

1 trustee may deduct the costs of mailing the notice of excess proceeds from
2 the additional proceeds.

3 C. In the trustee's discretion and instead of any one or more of the
4 applications specified in subsection A of this section, the trustee may elect
5 to deposit the balance of the proceeds with the county treasurer in the
6 county in which the sale took place pending an order of the superior court in
7 the county. On deposit of the balance of the monies and after complying with
8 subsection D of this section, the trustee shall be discharged from all
9 responsibility for acts performed in good faith according to this chapter.
10 The county treasurer shall reject any deposit that does not comply with
11 subsection D of this section.

12 D. If the trustee elects to deposit the balance of the sale proceeds
13 as prescribed by subsection C of this section, the trustee as plaintiff shall
14 commence a civil action in the superior court in the county in which the sale
15 occurred. The action shall name the applicable county treasurer as the
16 defendant, but the county treasurer has no obligation to respond to the
17 complaint or appear in the action. The trustee shall mail by certified or
18 registered mail, with postage prepaid, a conformed copy of the complaint that
19 displays the filing stamp of the court clerk to the county treasurer and all
20 persons, other than the beneficiary, who are entitled to notice pursuant to
21 section 33-809 and to any other person known by the trustee to have an
22 interest of record in the property at the time of the sale. THE CONFORMED
23 COPY SHALL BE MAILED TO ALL KNOWN ADDRESSES FOR THOSE PERSONS WHO ARE
24 REQUIRED TO RECEIVE NOTICE PURSUANT TO THIS SUBSECTION. The trustee shall
25 incorporate in or attach to the complaint:

26 1. A copy of any one of the following:

27 (a) The trustee sale guarantee and all amendments or endorsements
28 obtained by the trustee.

29 (b) The title search used by the trustee in connection with the
30 trustee's sale of the subject property and all amendments or endorsements
31 obtained by the trustee.

32 (c) A detailed description of the liens and encumbrances used by the
33 trustee in connection with the trustee's sale of the property.

34 2. A copy of the list of the persons and each of the KNOWN addresses
35 to which the complaint will be mailed.

36 3. A detailed description of any disbursements made by the trustee
37 pursuant to this section.

38 4. A narrative description of the liens and encumbrances as shown in
39 the trustee's sale guarantee, title report or detailed description, including
40 an analysis of the apparent priority of potential claimants. The trustee
41 shall not be liable for any error in the narrative description or analysis.

42 E. The trustee may withhold from the proceeds of the sale a reasonable
43 trustee's fee and reasonable attorney fees actually incurred and the costs of
44 filing the complaint, depositing the proceeds and mailing the notices.

1 F. Upon filing the complaint AND FILING THE SUBSEQUENT CERTIFICATE OF
2 MAILING FOR THE COMPLAINT WITH THE CERTIFIED MAILING RECEIPTS OF THE
3 ADDRESSEES, the trustee as plaintiff is discharged without prejudice from the
4 proceedings.

5 G. Any person with a recorded or other legal interest in the property
6 at the time of the sale may apply for the release of the proceeds by filing
7 an application for distribution in the civil action that was filed by the
8 trustee pursuant to subsection D of this section. The applicant shall mail
9 postage prepaid by any form of mail that requires a signed and returned
10 receipt a copy of the application to the county treasurer and all persons at
11 each of the addresses named on the list of persons that is incorporated in or
12 attached to the complaint AND TO ANY OTHER ADDRESS OF THE PERSONS THAT IS
13 KNOWN TO OR ASCERTAINED BY THE APPLICANT OR THE APPLICANT'S AGENT. THE
14 MAILING OF THE APPLICATION TO EACH INTERESTED PARTY SHALL OCCUR WITHIN THREE
15 BUSINESS DAYS AFTER THE FILING OF THE ORIGINAL APPLICATION WITH THE
16 COURT. On return of the signed receipt or the undelivered or unclaimed
17 original envelope, the applicant shall file with the court an affidavit that
18 states that the application was mailed to the person and that the application
19 was either:

20 1. Received, as evidenced by the receipt. The applicant shall attach
21 to the affidavit a copy of the receipt.

22 2. Not received, as evidenced by the returned envelope. The applicant
23 shall attach to the affidavit a copy of the original unopened and undelivered
24 or unclaimed returned envelope. IF THE RETURNED ENVELOPE WAS MARKED WITH A
25 NEW FORWARDING ADDRESS, WITHIN TEN BUSINESS DAYS AFTER RECEIPT OF THE
26 ORIGINAL RETURNED ENVELOPE THE APPLICANT SHALL:

27 (a) SEND BY CERTIFIED MAIL A COPY OF THE APPLICATION TO THE NEW
28 FORWARDING ADDRESS.

29 (b) FILE A SECOND AFFIDAVIT OF MAILING WITH THE COURT.

30 (c) MAIL A COPY OF THE SECOND AFFIDAVIT TO ALL PARTIES INDICATING THAT
31 THE APPLICATION WAS MAILED TO THE FORWARDING ADDRESS.

32 (d) CONTINUE SERVICE OF THE APPLICATION PURSUANT TO THIS PARAGRAPH
33 UNTIL THE ORIGINAL, UNOPENED AND UNDELIVERED ENVELOPE IS RETURNED WITHOUT ANY
34 FORWARDING ADDRESS.

35 H. WHEN MAILING TO ALL KNOWN ADDRESSES OF A BUSINESS OR FINANCIAL
36 INSTITUTION WITH AN INTEREST OF RECORD IN THE PROPERTY, THE TRUSTEE OR
37 APPLICANT SHALL ONLY BE REQUIRED TO MAIL TO THE PRIMARY ADDRESS OF THE
38 BUSINESS OR FINANCIAL INSTITUTION AS RECORDED WITH THE CORPORATION
39 COMMISSION.

40 ~~H.~~ I. Any person who receives the application or who claims a right
41 to the proceeds may file a response to the application within ~~thirty~~
42 FORTY-FIVE days of the LATEST mailing of the application. The person filing
43 a response shall mail a copy of the response to each applicant. Within ten
44 calendar days from the date the response is mailed, an applicant may file
45 with the clerk and mail to each respondent a reply to the response. On

1 expiration of the time for filing a reply, an applicant shall provide the
2 court with postage prepaid business envelopes that are addressed to all
3 persons who are entitled to receive copies of the complaint pursuant to
4 subsection D of this section. If an association with a claim is not paid by
5 the trustee pursuant to subsection A, paragraph 4 of this section and is
6 required to file an application or response pursuant to this subsection in
7 order to recover proceeds, the association may request from the excess
8 proceeds of the sale an award of its reasonable attorney fees and costs
9 incurred.

10 ~~I.~~ J. Except as provided in subsection L of this section, the court
11 shall issue an order to the county treasurer to release the proceeds
12 deposited with the county treasurer to the party entitled to receive them
13 after applying the priorities prescribed by subsection A of this section. On
14 notice to all persons who have received a copy of the complaint or who have
15 filed a responsive pleading, the court may, and if there are competing claims
16 to the proceeds, the court shall, hold a hearing to determine entitlement to
17 the proceeds. Every applicant or respondent shall acknowledge the existence
18 of any apparent lien, encumbrance or interest that could have priority over
19 the applicant or respondent. If the court finds that a person other than an
20 applicant or respondent has a superior right to receive the proceeds, the
21 court shall not issue an order on the proceeds until one hundred eighty days
22 from the date the complaint was filed. At any time before the expiration of
23 the one hundred eighty day period, an applicant or respondent may move for a
24 hearing to determine whether the claimed superior right is valid or
25 enforceable and whether the claim is entitled to receive priority over the
26 claim of the applicant or respondent. The motion shall set forth the
27 specific facts and evidence that support the applicant's or respondent's
28 position and shall be mailed to all persons who have received a copy of the
29 complaint or filed a responsive pleading. If a response is not filed within
30 the one hundred eighty day period by the person found by the court to have a
31 superior right to receive the proceeds, the court shall enter an order in
32 favor of any applicant or respondent entitled to the proceeds. On release of
33 the proceeds, the county treasurer may assess and deduct from the proceeds a
34 reasonable fee not to exceed one hundred dollars for the treasurer's costs
35 associated with the civil action.

36 ~~J.~~ K. Within ninety days after completion of the sale, the trustee
37 shall apply the proceeds of the sale pursuant to subsection A of this section
38 or shall deposit the proceeds with the treasurer pursuant to subsection C of
39 this section. If the trustee fails to comply with this subsection, the
40 trustee forfeits any entitlement to the fees and costs prescribed in
41 subsection E of this section and shall pay interest at the rate provided for
42 judgments pursuant to section 44-1201 from the date of completion of the sale
43 until the trustee complies with this subsection. Any person with a recorded
44 or other legal interest in the property at the time of the sale may commence
45 a civil action against the trustee for the trustee's failure to comply with

1 this subsection. The court may award the prevailing party its reasonable
2 attorney fees and costs incurred in that civil action.

3 ~~K.~~ L. Excess proceeds deposited with the county treasurer pursuant to
4 subsection C of this section are presumed abandoned if the monies remain with
5 the treasurer for at least two years from the date of deposit and there is no
6 pending application for distribution.

7 ~~L.~~ M. Excess proceeds that are fifty dollars or less and that are
8 presumed abandoned under this section shall be transferred to the county
9 general fund. No further application for distribution by any applicant or
10 claim by the department of revenue may be made on these monies.

11 ~~M.~~ N. For all excess proceeds that are greater than fifty dollars and
12 that are presumed abandoned under this section, the county treasurer shall
13 submit a report to the department of revenue pursuant to section 44-307. The
14 county treasurer may assess and deduct from the proceeds a reasonable fee of
15 not more than fifty dollars for the treasurer's costs associated with
16 reporting each deposit.

17 ~~N.~~ O. The county treasurer shall be discharged from all claims and
18 responsibility for acts performed in good faith pursuant to this chapter
19 after remitting the presumed abandoned excess proceeds to the department of
20 revenue pursuant to section 44-308.

21 ~~O.~~ P. A claimant may enter into an agreement with a third party to
22 pay for the recovery of or for assistance in the recovery of excess proceeds
23 on deposit with the county treasurer. The agreement shall be in writing,
24 signed by the claimant, and the claimant's signature shall be acknowledged by
25 a notary public or other person authorized to accept an acknowledgment
26 pursuant to section 33-511. Any agreement entered into before the expiration
27 of thirty days after the date the trustee's sale was held, but not including
28 the date of the sale, is void and unenforceable. Any fee or payment provided
29 for in an agreement shall be reasonable. The fee or payment shall be
30 presumed to be unreasonable and the obligation to pay the fee or payment is
31 unenforceable if the fee or payment agreed on exceeds two thousand five
32 hundred dollars excluding attorney fees and the costs of filing the claim and
33 providing the statutorily required notices. Any person seeking a fee or
34 payment exceeding two thousand five hundred dollars may apply to the court
35 for additional compensation but the person has the burden of establishing
36 that the additional compensation is reasonable under the circumstances. This
37 subsection does not preclude a claimant from contesting the reasonableness of
38 any fee or payment that is provided for in an agreement for the recovery of
39 or for assistance in the recovery of excess proceeds.

~~APPROVED BY THE GOVERNOR APRIL 20, 2010.~~

~~FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 21, 2010.~~